

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 20050003

CORRECTED AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY WAYNE RUTT AND PAUL
MARRICK REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE
VIOLATIONS BY POUFRE EDUCATION ASSOCIATION, COLORADO
EDUCATION ASSOCIATION, AND POUFRE SCHOOL DISTRICT**

Procedural History

This matter is before the Division of Administrative Hearings (“Division”) on the complaint of Wayne Rutt and Paul Marrick (“Complainants”) against the Poudre Education Association (“PEA”), the Colorado Education Association (“CEA”), and the Poudre School District (“PSD” or “district”). The original complaint was filed with the Colorado Secretary of State on February 22, 2005. On February 23, 2005, the Secretary of State referred the complaint to the Division as required by Colo. Const. art. XXVIII, § 9(2)(a). The original complaint alleges that PEA violated certain provisions of the Fair Campaign Practices Act (“FCPA”)¹ by: coordinating its electioneering activities with the Bob Bacon campaign (“Bacon” or “Bacon campaign”); compensating its volunteers for their efforts on behalf of the Bacon campaign; illegally causing public facilities and resources to be used for partisan politics; and illegally engaging in express advocacy supporting the election of Bacon. Hearing on the complaint was scheduled before Administrative Law Judge (“ALJ”) Michelle A. Norcross on March 7, 2005. On March 3, 2005, the Complainants’ and PEA moved to vacate the March 7 hearing. The hearing was reset on May 2, 2005.

Pre-hearing Motions

On April 13, 2005, Complainants filed a Motion to Join Additional Defendants to Amended Complaint and Amended Complaint with the Secretary of State. The Division received the motion and Amended Complaint on April 14, 2005. In their April 13 motion, Complainants sought to join CEA as a defendant on the basis that PEA and CEA worked closely together to support Bacon’s candidacy and their coordinated efforts with the Bacon campaign violated the FCPA. Complainants also sought to join PSD as a defendant on the basis that PSD used public resources to support Bacon’s candidacy, in violation of the

¹ Section 1-45-101, *et seq.* C.R.S. (2004)

FCPA. PSD filed a response to the motion to join additional defendants on April 25, 2005.

On April 25, 2005, PEA and CEA filed a Motion to Dismiss under C.R.C.P. 12(b)(5). On the same day, Complainants filed a Motion to Vacate and Reschedule Hearing. PSD opposed the motion to reschedule the hearing. PEA and CEA also opposed the motion to reschedule the hearing, but alternatively suggested that the ALJ retain the hearing date for consideration of their Motion to Dismiss. On April 26, 2005, the ALJ converted the May 2 merits hearing to a motions hearing on the Motion to Join Additional Defendants and the Motion to Dismiss.

Following the May 2 motions hearing, the ALJ granted Complainants' request to join CEA and PSD as defendants. The ALJ denied the Motion to Dismiss, but ordered Complainants to file a more definite statement of the facts and allegations underlying their complaint against all three defendants no later than May 4, 2005². Hearing on the complaint was conducted in Denver, Colorado, on May 16 and June 1, 2005.

Motions made at Hearing

Motion to Exclude Evidence. PEA and CEA move to exclude all of Complainants' evidence in this case on the basis that the evidence was unlawfully obtained. The parties requested an opportunity to submit legal briefs on the issue. The ALJ granted the request and granted PEA and CEA a continuing objection to Complainants' evidence at hearing. The record was open through the close of business on June 13, 2005, for the submission of written legal argument.

Complainant Rutt obtained documents from a trash dumpster located in the parking lot adjacent to PEA's offices; the dumpster is enclosed in an unlocked wooden fence. There is a disagreement between the parties as to the precise manner in which Rutt obtained the discarded documents. PEA and CEA claim that Rutt entered the dumpster and removed them. Rutt claims that he removed the items from outside and alongside the dumpster and never entered the dumpster. The ALJ finds that she does not have to resolve this factual dispute in order to rule on the motion. The documents relate to PEA's activities in the race for State Senate in district 14. Based on the documents Rutt retrieved from the trash, Complainants made several requests for documents under the Colorado Open Records Act and subsequently filed this complaint.

PEA and CEA allege that Rutt's actions violated § 12-12 of The City of Fort Collins municipal code (prohibiting tampering with or removing trash from a dumpster) and § 12-16 (committing second degree criminal trespass by entering upon the premises of another which are enclosed in a manner designed to

² On May 4, 2005, the Division received Complainants' Second Amended Complaint.

exclude intruders or are fenced). Accordingly, PEA and CEA object to the admission of Complainants' evidence for the following three reasons: first, the evidence should be excluded to preserve the judicial integrity and deter lawless behavior as a discovery tool; second, the doctrine of unclean hands bars unlawfully obtained evidence; and finally, but for Rutt's unlawful discovery of documents in PEA's trash, Complainants would not have initiated their complaint.

The standard for applying the exclusionary rule in a civil case is set forth in *Ahart v. Colorado Dept. of Corrections*, 964 P.2d 517 (Colo. 1998). In *Ahart*, the court held, "[t]he question of whether the exclusionary rule applies in a particular civil case requires weighing the deterrent benefits of applying the rule against the societal cost of excluding relevant evidence. The assessment of the deterrent benefits requires a fact-specific analysis that usually involves two considerations: (1) whether the illegal agency conduct is 'inter-sovereign' or 'intra-sovereign'; and (2) whether the proceedings can be characterized as 'quasi-criminal'". *Ahart*, at 520.

In civil proceedings, courts must decide whether the exclusionary rule applies on a case by case basis. The existence of certain factors does not automatically trigger application of the rule. In circumstances where some factors strongly support the rule's application – e.g., the Fourth Amendment violation is intra-sovereign; the proceeding at issue is quasi-criminal – a court's determination as to the applicability of the exclusionary rule cannot be legally sufficient unless the court weighs the benefits against the costs of applying the rule.

Id., at 523.

As opposed to the circumstances in *Ahart*, the alleged illegal activity in this case was not done by a governmental agency. Moreover, the proceedings in FCPA case are not considered "quasi-criminal" in nature; they are regulatory proceedings. The threshold question then becomes whether the deterrent benefits of excluding the evidence outweigh the societal costs of depriving this tribunal of relevant evidence concerning campaign activities.

In November 2002, the voters of Colorado adopted campaign finance laws to protect the political process by: limiting campaign contributions, encouraging voluntary campaign spending limits, providing for full and timely disclosure of campaign contributions, independent expenditures, and funding of electioneering communications, and enforcing campaign finance requirements. Colo. Const. art. XXVIII, § 1. As an enforcement mechanism, the Colorado Constitution permits a private citizen to file a complaint with the Secretary of State if he believes a violation has occurred. Once a complaint is filed, the matter must be referred to an ALJ to make specific findings and conclusions of material issues of fact or law. Colo. Const. art. XXVIII, § 9(2)(a) and § 24-4-105 (14)(a), C.R.S.

In the instant case, the ALJ concludes that excluding relevant evidence from the record prevents her from making factual determinations concerning alleged campaign violations. Applying the exclusionary rule in this case creates a substantial cost that counters any deterrent effect. Therefore, PEA's and CEA's motion to exclude Complainants' evidence is denied. Complainants' exhibits 1 through 5 are admitted into evidence. At hearing, the ALJ admitted exhibits 6, 7, 9, 10, R, S, AA, BB, CC, and the depositions of: Wayne Rutt; Paul Marrick; Ryan Wulff; Jeanne Beyer; Suzie Brueske; and Mary Lynn Jones.

Voluntary Dismissal of Third Claim for Relief. At hearing, Complainants voluntarily dismissed their Third Claim for Relief in their Second Amended Complaint. Complainants' Third Claim for Relief relates to allegations of campaign contribution violations by PEA to the Colorado Democratic Party.

Motion to Dismiss. At the close of Complainants' case in chief, PEA, CEA and PSD moved to dismiss counts One, Two, Four, Five and Six of the complaint. The ALJ denied the motions as to counts One, Two, Four and Five and granted the motion as to count Six. Complainants' Sixth Claim for relief asserts that PEA violated § 1-45-117, C.R.S. The ALJ found no evidence that PEA was a governmental entity and therefore, as a matter of law, it could not be found to have violated the provisions of § 1-45-117.

Parties Positions

Complainants: Complainants' allege that PEA and CEA contributed to the candidate committee of Bob Bacon for State Senate by recruiting members and non-members to distribute literature on behalf of the campaign; by recruiting members to send postcards to members and non-members urging them to vote for Bob Bacon, and by tightly coordinating their efforts with the Bob Bacon campaign. Additionally, PEA and CEA contributed to the Bacon campaign by compensating certain employees to assist with the campaign and by using PSD's electronic mail ("email") system, inter-office mail, and school facilities to recruit its members for the Bacon campaign. Finally, PEA's and CEA's activities constitute independent expenditures that expressly advocate the election of Bacon and are a violation of the Colorado Constitution.

Complainants' further assert that PSD violated § 1-45-117, C.R.S. because PEA's and CEA's use of PSD's email system, inter-school mail, and facilities constituted a contribution to the Bacon campaign. Furthermore, because PSD officials had knowledge that PEA and CEA were using its facilities to make contributions to the campaign and by failing to take necessary steps to stop the use of its facilities, PSD tacitly approved of the contributions.

PEA and CEA: PEA and CEA dispute the allegation that they made contributions or independent expenditures to or on behalf of the Bacon campaign in violation of

the Colorado Constitution or the FCPA. Rather, they contend that they did not coordinate their activities with the Bacon campaign and their efforts to help elect Bacon were not a contribution to his campaign. Additionally, their activities are exempt from regulation as expenditures and independent contributions because their activities are considered communications and payments for communication between a membership organization and its members.

PSD: The district, too, denies that it made a contribution to the Bacon campaign in violation of § 1-45-117, C.R.S. PSD has a policy prohibiting the use of its facilities for partisan politics. As soon as it became aware that PEA and CEA were using district facilities in violation of the policy, it took immediate and reasonable steps to correct the situation. Moreover, after addressing the issue with the heads of the education associations and district employees, PSD had no knowledge or reason to know that the associations continued to use its facilities in violation of the policy.

FINDINGS OF FACT

Based on the evidence in the record, the ALJ finds the following facts:

1. In the November 2004 general election, Bacon ran as a candidate for State Senate District 14 ("SD 14"). In connection with his candidacy, he established a candidate committee and hired Gray McGinnis as his campaign manager.
2. In the summer of 2004, PEA and CEA, on behalf of their memberships, made the decision to support Bacon in his candidacy.
3. PEA is a local education association. Membership in PEA is available to all Poudre public school employees. CEA is a state education association available to all Colorado public school employees. In order to belong to CEA, a person must also be a member of his or her local education association. Any one who is a member of PEA is also a member of CEA.
4. PEA has close to 1,000 members. The September, October, and November 2004 PEA membership lists in the record are not complete lists of all association members. The membership lists submitted at hearing contain only the names of those members who have their dues automatically withheld each month. Some members pay their dues by check or cash; their names are not included in the membership lists in evidence.
5. Prior to running for SD 14, Bacon was a schoolteacher in the Poudre school district for 30 years and was the president of PEA during that time. The members of PEA and CEA voted to support Bacon based on his belief in and support for public education.

6. In furtherance of the associations' support of Bacon, PEA and CEA made promises, goals, and commitments to their members to help elect Bacon. Each school set goals for volunteer recruitment. Their commitments were not made to Bacon or to the Bacon campaign. Rather, their commitments were to their members.

7. PEA's offices are located in Fort Collins, Colorado. Mary Lynn Jones is the president; Suzie Brueske is the office manager. Brueske is paid by PEA. Jones is a school district employee; her salary is paid by in part by PEA and in part by the school district. Jones' and Brueske's services are provided to PEA members.

8. CEA's offices are located in Denver, Colorado. Ryan Wulff is CEA's lobbyist. Jeanne Beyer is CEA's Director of Communications. Wulff and Beyer, as members of CEA, assisted PEA in its efforts to help elect Bacon. At all times relevant to this decision, Wulff's and Beyer's services were provided to PEA and CEA members.

9. In the fall of 2004, PEA and CEA planned two events where members would walk and distribute Bacon literature to precincts in SD 14. The first walk was called the "Great Pumpkin Rally"; it took place on Saturday, October 9, 2004. The second walk was called the "Halloween Hike"; and it took place on Saturday, October 30, 2004.

10. PEA and CEA devoted a lot of time recruiting members to participate in the October 9 and 30 walks. Members were invited to bring family members, neighbors and friends from other local education associations to walk with them on October 9 and 30.

11. The majority of the communications between PEA and CEA and members regarding the walks took place via PSD's email system. Some of the communications were made through the district's inter-office mail. The district's inter-office mail system services 55 buildings, including PEA, and cannot be used by anyone outside the district and is not available for public use.

12. Copies of the email documents in the record contain, among other things, the names of people to whom the emails were sent (i.e. the distribution list). Some of the email distribution lists reflect names not appearing on the PEA membership rosters. However, because the record does not contain a complete list of PEA members during the time the emails were sent, the ALJ cannot and does not find that the emails regarding the Bacon events were sent to non-members.

13. In order get the word out about the walks, PEA also set up several building visits at a number of schools in the district where Wulff, Beyer, and Jones spoke to PEA members about volunteering to walk in support of Bacon.

The building visits were scheduled either before or after school or over the lunch hour.

14. Wulff worked in PEA's offices for several weeks prior to the election. He was primarily responsible for planning the October 9 and 30 walks. He recruited volunteers, developed precinct walking maps, reviewed voter lists, obtained Bacon literature and yard signs, and developed targeted precinct walking lists.

15. In addition to his role with CEA, Wulff volunteered for the Bacon campaign on his own time. Wulff walked with Bacon's campaign volunteers on several occasions on Thursday evenings distributing literature and talking with voters. Several other teachers and administrators living in SD 14 also volunteered to walk with the Bacon campaign in the evenings after school. These events were not sponsored by PEA; they were Bacon campaign events.

16. Between August and October 2004, Wulff had several conversations with Bacon and McGinnis, Bacon's campaign manager, regarding dates, times and locations of Bacon campaign events. Wulff provided this information to PEA members who wanted to walk with the Bacon campaign during weekdays after school. Wulff did not recruit volunteers for the Bacon campaign's after school walks.

17. While volunteering for the Bacon campaign, Wulff received yard signs and literature from the Bacon campaign. Yard signs were given to members wanting them and the literature was handed out at the October 9 and 30 walks. All the Bacon literature was prepared by and paid for by the Bacon campaign.

October 9 walk

18. Prior to the October 9 walk, Wulff got precinct maps from the county clerk and recorder. He prepared the targeted precinct walking lists by using information contained in voter lists purchased by CEA.

19. The voter lists used by Wulff to prepare targeted precinct maps includes information regarding voter registration, address, phone number and voting histories. When putting together plans, maps or walker instructions for the October 9 walk, Wulff did not rely on any voter lists or any other information from the Bacon campaign. PEA's October 9 event was not coordinated with the Bacon campaign. Neither Bacon nor his campaign were involved in approving, planning, or organizing the walk.

20. Once he prepared the precinct maps, Wulff filled bags with the maps, voter lists, bottles of water, and Bacon literature. The walkers were given instructions along with their literature and maps. The instructions asked the

walkers to note information about the voters on their lists including information about which voters were not home, voters voting for Bacon, undecided voters, voters opposing Bacon, and voters wanting Bacon to contact them. Walkers were asked to return this information to Wulff.

21. On the morning of the 9th, volunteers gathered in the PEA parking lot. Bacon came for 5 to 10 minutes to thank the volunteers and left. Bacon knew about this event because Wulff told him about it. One hundred and forty-four volunteers from PEA/CEA walked on October 9. The record does not establish whether non-members participated in the event as well.

22. PEA and CEA did not coordinate their volunteer recruitment activities with the Bacon campaign for the October 9 event. And there is no credible evidence that the associations' activities on October 9 relieved Bacon of the need to conduct his own campaign activities or enabled him to modify his campaign plan in any way.

October 30 walk

23. Following the October 9 walk, from his own experience and feedback from walkers, Wulff learned that much of the information in the voter files was inaccurate and unreliable. He did not have the time or the manpower to update or correct the errors in the voter lists before the October 30 walk. Therefore, Wulff decided not to use the voter files for targeted precinct walks on October 30. Wulff did not share any information he learned from the volunteers following the October 9 walk with the Bacon campaign, including information about voters wanting Bacon to contact them.

24. For the October 30 walk Wulff decided to have the walkers distribute literature to every house in identified precincts. Wulff's literature distribution plan differed from the plan being used by the Bacon campaign.

25. Based on its own voter data, the Bacon campaign decided during its walks it would continue hanging bags of literature on specific voter doors identified and targeted through precinct walks and phoning. Wulff believed this was not a good idea for PEA's October 30 event for two reasons: one, the data in the voter lists proved to be unreliable and two, if the weather turned bad, walking only targeted doors would be harder and thus more difficult to count on getting volunteers.

26. Wulff did not corroborate or coordinate PEA's plans to distribute literature on the 30th with the Bacon campaign. This finding is supported by the unrefuted fact that PEA's and CEA's voter targeting did not match up with the targeting done by the Bacon campaign.

27. The second walk took place on Saturday, October 30, 2004. The event was similar to the October 9 walk, except that the walkers only distributed Bacon literature; they did not knock on doors and talk to voters. Bacon also came to this event for 5 or 10 minutes to thank the volunteers and left. Bacon knew about this event because Wulff told him about it. Neither Bacon nor the Bacon campaign was involved in approving, planning or organizing this walk.

28. PEA and CEA tried to get 300 walkers for this event. One hundred and twenty-eight PEA/CEA members walked on October 30. The record does not establish whether non-members participated in the event as well.

29. Prior to the October 30 walk, Jones and Beyer made phone calls and/or sent letters to members of the Association of Classified Employees ("ACE"), the Poudre Association for School Executives ("PASE") and other local education associations to walk with PEA members on the 30th. Members of ACE, PASE and other local education associations are not members of PEA.

30. The number of phone calls made by Jones and Beyer to non-PEA members and the number of letters sent by Jones to non-PEA members regarding the October 30 walk are not part of this record.

31. There is also no evidence establishing whether any members of ACE, PASE or other local education associations walked with PEA/CEA members on October 30.

32. PEA and CEA did not coordinate their volunteer recruitment activities with the Bacon campaign for the October 30 event. And there is no credible evidence that the associations' activities on October 30 relieved Bacon of the need to conduct his own campaign activities or enabled him to modify his campaign plan in any way.

Postcards

33. In mid-October 2004, PEA sent PEA Area Representatives ("ARs") a batch of postcards for its members to send to voters in SD 14. PEA communicates a lot of information to its individual members through ARs. Each school has at least one AR on site. The postcards were pre-printed with message, "I'm voting for Bob Bacon." Members were asked to address and mail the postcards to voters.

34. One PEA member sent an email to Wulff and Beyer indicating that the postcards got a great response from the members not walking "I think it eases their guilt about not walking!" Whether any of these postcards were actually mailed out by members is a fact not established by the evidence. Further, there is insufficient evidence to establish the cost of the postcards or whether PEA or CEA paid for the postcards.

Use of district facilities

35. It is undisputed that Brueske and Jones sent numerous email messages to members and ARs using PSD's email system. Inter-school mail was also used to distribute information to ARs about Bacon events.

36. PSD has a policy prohibiting the use of school facilities and equipment to support or oppose a ballot issue or a candidate. This policy was adopted prior to the 2004 election cycle and provided in writing to district officials and employees.

37. On September 23, 2004, Anne Yeldell, a PSD board member, received an email regarding PEA's back to school activities including solicitation for volunteers to help elect Bacon. Yeldell took a copy of the email to members of the school board and the school superintendent believing that the communication was an inappropriate use of the district's email system.

38. On September 24, 2004, Todd Gamble, PSD's Executive Director of Human Resources, was contacted by the school superintendent and asked to investigate Yeldell's complaint.

39. After reading the email message supporting Bacon's candidacy, Gamble and school officials agreed that the email violated the district's policy regarding the use of school facilities for partisan politics. Gamble discussed the matter with the president of PEA (Jones), as well as the president of ACE and PASE and told them they could not use the district's facilities to send these types of messages to their members.

40. On September 28, 2004, Gamble sent a memo to the three employee group presidents reminding them that district resources are public property and cannot be used for partisan politics. Gamble also sent a copy of the district's policy regarding use of facilities during an election to all school district employees.

41. PEA continued to use the district's facilities in violation of the policy. PSD officials were unaware that the district's facilities were still being used for partisan politics.

42. Gamble and PSD officials reasonably relied on their belief that Jones and the members of PEA understood the district's policy regarding election communications. Moreover, PSD had no reason to know or believe that the president of PEA and its members would disregard the directive issued in the September 28 memo.

43. Following the September 23 complaint, PSD officials never received a complaint or information that PEA was still using school facilities for Bacon events.

44. Without a reason, such as a complaint investigation, PSD does not read teachers' email or inter-school communications. Therefore, despite the fact that numerous communications continued between PEA and its members in violation of the district's policy, the ALJ does not find it unreasonable that PSD was unaware that its facilities were still being used to support Bacon's candidacy.

45. In February 2005, PSD officials learned that a local television station was featuring a story on PEA's use of school facilities for Bacon events. At that time, district officials believed the story related back to the September 2004 complaint; they did not know PEA had continued to use district facilities for Bacon events. It was not until ten days prior to the first day of hearing in this matter when district officials first learned that PEA and some of its members had not complied with the district's policy.

46. PSD took reasonable and appropriate steps to prevent its employees from using district facilities for partisan politics and did not make a contribution to the Bacon's campaign either through its own actions or those of PEA or CEA.

DISCUSSION

Complainants' argue that PEA and CEA illegally contributed to the Bacon campaign and that PEA illegally engaged in express advocacy in violation of Colo. Const. art. XXVIII § 3(4)(a). Under § 3(4)(a), It shall be unlawful for a labor organization to make contributions to a candidate committee, and to make expenditures expressly advocating the election of a candidate; except that a labor organization may establish a political committee or small donor committee which may accept contributions or dues from employees, officeholders, shareholders, or members.

Contribution is defined as: (a) the payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee; (b) any payment made to a third party for the benefit of any candidate committee; (c) the fair market value of any gift or loan of property made to any candidate committee; or (d) anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's election. Colo. Const. art. XXVIII, § 2(5)(a)(I) – (IV). Additionally, expenditures by persons that are controlled by or coordinated with a candidate are also deemed to be a contribution by both the maker of the expenditure and the candidate committee. Colo. Const. art. XXVIII, § 2(9).

Contribution does not include services provided without compensation by individuals volunteering their time on behalf of a candidate committee or

independent expenditures expressly advocating the election of a candidate valued at less than \$1,000. Colo. Const. art. XXVIII, §§ 5(b) and 2(9), respectively. Also excluded from regulation are communications made by a membership organization solely to its members and their families and payments by a membership organization for any communication made solely to its members and their families. Colo. Const. art. XXVIII, §§ 2(7)(b)(III) and 8(b)(III), respectively.

Were PEA's and CEA's activities coordinated with the Bacon candidate committee?

The majority of Complainants' case is premised on the argument that PEA and CEA so tightly coordinated their efforts with the Bacon campaign that they effectively operated as the volunteer coordinator for the Bacon campaign. And, as a result of PEA's and CEA's coordinated efforts, the associations contributed to the Bacon campaign by making payment to a third party for the benefit of Bacon and by giving a thing of value to the Bacon campaign. The ALJ concludes that Complainants have not established coordination between the associations and the Bacon campaign by a preponderance of the evidence.

It is the role of the ALJ to weigh the evidence and from the evidence reach conclusions. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative proceeding is "by a preponderance". This standard has been explained as follows:

The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate; the preponderance test means that the fact finder must be convinced that the factual conclusion it chooses is more likely than not.

Koch, Administrative Law and Practice, Vol. I at 491 (1985).

In the summer of 2004, PEA and CEA made the decision to support Bacon for SD 14. Toward that end, the associations made commitments and promised to recruit members to help Bacon get elected. Each school set goals for volunteer recruitment. These promises and commitments were made to the members of the education association; they were not made to Bacon or his candidate committee.

PEA and CEA spent several weeks prior to the election obtaining voter lists, analyzing precinct voter history and putting together the Great Pumpkin Walk and the Halloween Hike. PEA and CEA relied on their own data to develop the precinct maps and targeted literature drops for the October events. They did not coordinate with the Bacon campaign when creating the precinct maps, the walking lists, or the volunteer script. The only two items PEA and CEA received from the Bacon campaign for the October events were yard signs and Bacon literature. Obtaining campaign literature and handing out yard signs do not equate to tightly coordinated campaign activities. The best evidence that PEA and CEA undertook their own campaign efforts is the fact that PEA's and CEA's voter targeting did not match up with the targeting done by the Bacon campaign.

On the mornings of both walks Bacon showed up for 5 to 10 minutes to thank the volunteers who turned out. Complainants' assert that Bacon's presence at these events establishes coordination with PEA and CEA insofar as it is evidence of his agreement to and approval of these events. The only evidence in the record about Bacon's knowledge of these events is Wulff's statement that he told Bacon about the walks. There is no credible evidence that PEA or CEA sought Bacon's assent or approval for the activities or that they coordinated with his campaign prior to scheduling them. Moreover, there is no credible evidence that PEA or CEA provided the Bacon campaign with voter feedback following the October walks.

Complainants' contention that PEA's and CEA's activities were so tightly coordinated with the Bacon campaign that the associations effectively operated as the volunteer coordinator for the Bacon campaign is not supported by the weight of the evidence. The ALJ concludes that PEA and CEA did not coordinate their volunteer recruitment activities with the Bacon campaign. And there is no credible evidence that the associations' activities relieved Bacon of the need to conduct his own campaign activities or enabled him to modify his campaign plan in any way.

Were PEA's and CEA's activities value to the Bacon campaign?

"Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall or election", is considered a contribution. Colo. Const. art. XXVIII, § 2(5)(a)(IV). Contribution does not include services provided without compensation by individuals volunteering their time on behalf of a candidate. Colo. Const. art. XXVIII, § 2(5)(b). None of the time spent by the walkers on October 9 and 30 can be considered a contribution because it is excluded as uncompensated volunteer time. The question then becomes whether the activities performed by Jones, Brueske, Beyer and Wulff may be considered a contribution.

The PEA and CEA staff services were not provided to the Bacon campaign. Rather, they were provided to the associations' members. Therefore,

they are not considered a contribution to the Bacon campaign. Additionally, the PEA and CEA staff services provided to association members cannot be considered contributions. To do so would interfere with the preemption of a membership's communication with its members under the Colorado Constitution. To find otherwise would create a contradictory dilemma for groups such as PEA and CEA.

In the areas of expenditures and electioneering communications, the Colorado Constitution protects from regulation communications and payments for communications between a membership organization and its members. Colo. Const. art. XXVIII, §§ 2(7)(b)(III) and 2(8)(b)(III). PEA's and CEA's communications and payment for communications with members cannot both be excluded from regulation and also be considered reportable contributions, even if the consequence of which results in a loophole in the law.

As the Colorado Supreme Court has noted, courts are not in a position to fill in gaps or eliminate loopholes in the voter-approved campaign laws.

[A] reading of the plain language of the statute may allow some organizations to slip past the disclosure requirements by forming for another purpose and then switching activities to focus on ballot questions. While this loophole in the statute may be troubling, it is one created by the drafting of the FCPA, and we are bound by the Act's plain language. This is a statutory problem that cannot be mended by judicial fiat. We, therefore, must resist the temptation to change the statutory language, and rather must leave any repair to the General Assembly or the electorate.

Common Sense Alliance v. Davidson, 995 P.2d 748, 755 (Colo. 2000). In accordance with the *Common Sense Alliance* case, the ALJ concludes that PEA's and CEA's activities with its members are excluded as membership communications and cannot also be deemed a contribution to the Bacon campaign regardless of whether their efforts provided value to the campaign.

Did PEA and CEA make payments to third parties on behalf of Bacon?

Complainants' allege that a portion of Beyer's salary, Wulff's salary, Jones' salary, Brueske's compensation, the cost of precinct maps, coping expenses, refreshments, office supplies, and office space were payments made to third parties on behalf of Bacon and should have been reported as contributions.

A large component of the associations' efforts towards helping elect Bacon were the two walks that took place in October 2004. None of these efforts can be considered contributions because they were performed by uncompensated volunteers. In contrast, Beyer, Wulff, Jones and Brueske were

compensated for the time the spent planning and organizing the walks. Thus, the ALJ must determine whether their salaries and the incidental costs associated with the maps, office supplies, office space and refreshments provided to the walkers were contributions to the Bacon campaign.

As discussed in detail above, the evidence shows that PEA's and CEA's activities were not coordinated with or controlled by the Bacon campaign. Moreover, the record establishes that the PEA and CEA staff services were not provided on behalf of Bacon. Rather, they were provided to and on behalf of the associations' members. The maps, office supplies, office space and refreshments were provided to and/or on behalf of the associations' members for the walks on October 9 and 30, which are excluded as volunteer activities. Accordingly, the ALJ concludes that the compensation provided to PEA staff, CEA staff as well as the costs of the cost of precinct maps, coping expenses, refreshments, office supplies, and office space were not payments made to third parties on behalf of Bacon.

Were PEA's and CEA's communications and payments for communications made solely to members and their families?

The only credible evidence in the record supporting the claim that PEA and CEA communicated to persons outside the membership is testimony of Jones and Beyer that they telephoned and sent letters members of ACE, PASE and other local education associations to walk on October 30. There is insufficient evidence to establish that the emails and inter-school communications regarding the Bacon events went to non-members. It is undisputed that members were encouraged to invite non-members to the walks; however, that is not the issue. The crux of the analysis is whether the membership's communications were made solely to its members and their families. Because the record does not include a complete list of PEA members, it cannot be found that the names on the email distribution list include non-members. Likewise, there is no credible or reliable evidence that any of the inter-school mail was delivered to non-members as the system cannot be used or accessed by the public.

The telephone calls made and letters sent to ACE, PASE and members of other local education associations are communications that fall outside the membership and therefore are not exempt from regulation as electioneering communications under Colo. Const. art. XXVIII, § 7(b)(III). Likewise, payments made by the membership organization for these communications are not exempt as expenditures under Colo. Const. art. XXVIII, § 8(b)(III). However, as required by Colo. Const. art. XXVIII, § 6 (1), in order to be reportable as an electioneering communication, there must be evidence that the party making the expenditure spent more than \$1,000 on the communication. There is no such evidence in this record. Accordingly, Complainants have not established that the

communications or payment for communications to ACE, PASE or members of other local education associations triggered a reporting requirement.

Were the postcards sent by PEA considered an independent expenditure?

An independent expenditure is an expenditure that is not controlled by or coordinated with any candidate. Colo. Const. art. XXVIII, § 2(9). The postcards sent by PEA to its members were not controlled by or coordinated with the Bacon campaign. They, therefore, fit the definition of an independent expenditure. However, as with electioneering communications, the expenditure need not be reported unless the cost exceeds \$1,000. Colo. Const. art XXVIII, § 5(1). Complainants' argument that the postcards should have been reported as an independent expenditure fails for two reasons: there is insufficient evidence to establish that PEA or CEA paid for the postcards; and more importantly, there is insufficient evidence to conclude that the cost of the postcards exceeded \$1,000.

Were PEA's and CEA's recruiting activities considered independent expenditures?

As discussed above, all activities relating to communications and payments for communications between PEA and CEA and its members are excluded from the definition of expenditure. Conversely, activities relating to communications and payments for communications to non-member fall outside the exemption and may be considered independent expenditures. In this case, the only non-member activity established by the evidence are the calls made and letters sent by Jones and Beyer to ACE, PASE and non-PEA education association members just before the October 30 walk.

The question then becomes, were the calls and letters to non-members independent expenditures? They were not controlled by or coordinated with the Bacon campaign. But, as with the postcards, the value or cost of the calls and/or letters has not been established to exceed \$1,000. Therefore Complainants have not established a violation of Colo. Const. art. XXVIII, § 5(1).

Did PSD violate § 1-45-117, C.R.S. by allowing employees to use school resources to support Bacon's candidacy?

Complainants' argue that PSD violated § 117 in one of three ways: (1) PSD failed to prohibit district officials and employees from making contributions to the Bacon campaign; (2) PSD was negligent in failing to institute measures necessary to prevent district officials and employees from using its facilities; or (3) alternatively, PSD officials had knowledge of employee use of its facilities and by failing to take necessary steps PSD tacitly approved of the contributions.

Under § 1-45-117(1)(a)(I), C.R.S., no agency, department, board, division, bureau, commission, or council of the state or any political subdivision thereof

shall make any contribution in campaigns involving the nomination, retention, or election of any person to any public office. In concert with § 117 and prior to the filing of this complaint, PSD adopted a written policy prohibiting the use of its facilities for political purposes during an election. The policy clearly describes what activities are prohibited and it is routinely distributed to district officials as well as employees. Prior to September 23, 2004, PSD had no reason to believe its employees were violating the policy. As soon as the matter was brought to the board, the district took reasonable and immediate steps to prevent further unauthorized use of its facilities. PSD reasonably believed that PEA's use of its facilities for Bacon events would stop. PSD cannot and should not be held accountable for PEA's disregard of district policy and written directive.

Further, the evidence fails to support a claim that PSD had knowledge of PEA's continued use of its facilities. As a general rule, PSD does not read teachers' email or inter-school mail; consequently, absent further complaints, it did not know and had no reason to know that PEA members continued to use school facilities in violation of district policy. PSD did not make a contribution to the Bacon campaign. Moreover, it took reasonable steps to prevent its officials and teachers from using district facilities in violation of § 117. Accordingly, the ALJ concludes that PSD did not violate § 117 of the FCPA.

CONCLUSIONS OF LAW

Based on the Findings of Fact, the ALJ makes the following Conclusions of Law:

1. Pursuant to Colo. Const. art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.

2. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)³. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainants are the proponent of an order seeking civil penalties and/or injunctions against PEA, CEA, and PSD for violations of the Colorado Constitution and the FCPA. Accordingly, Complainants have the burden of proof.

3. Complainants have not established by a preponderance of the evidence that PEA illegally contributed to the Bob Bacon campaign in violation of Colo. Const. art. XXVIII, § 3(4)(a).

4. Complainants have not established by a preponderance of the evidence that PEA engaged in express advocacy in violation of Colo. Const. art. XXVIII, § 3(4)(a).

³ Section 24-4-101, *et seq.*, C.R.S.

5. Complainants have not established by a preponderance of the evidence that CEA illegally contributed to the Bob Bacon campaign in violation of Colo. Const. art. XXVIII, § 3(4)(a).

6. Complainants have not established by a preponderance of the evidence that PSD illegally contributed to the Bob Bacon campaign in violation of § 1-45-117, C.R.S.

AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that neither PEA, CEA, nor PSD violated the FCPA or Article XXVIII of the Colorado Constitution in any respect alleged in counts One, Two, Four and Five of the Second Amended Complaint. The complaint is dismissed. Each party is responsible for paying their own costs and attorneys' fees associated with the filing of this complaint.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

DONE AND SIGNED

Nunc pro tunc
June 29, 2005

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **CORRECTED AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Scott Gessler, Esq.
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and

William Hobbs
Secretary of State's Office
1700 Broadway, Suite 250
Denver, CO 80290

on this ____ day of _____ 2005.
